



In the Matter of:

**LINDA ROBERTS,**

**ARB CASE NO. 97-038**

**COMPLAINANT,**

**ALJ CASE NO. 96-ERA-24**

**v.**

**DATE: June 4, 1997**

**BATTELLE MEMORIAL INSTITUTE,  
ET AL.,**

**RESPONDENTS.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

### **FINAL DECISION AND ORDER**

This matter arises under the employee protection provision of the Energy Reorganization Act, as amended (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992). Complainant Linda Roberts filed a complaint with the Department of Labor in which she alleged that Respondents, Battelle Memorial Institute and five individuals, suspended her without pay and discharged her from employment because she made health and safety complaints protected under the ERA. In a Recommended Decision and Order (R. D. and O.) (attached), the Administrative Law Judge recommended dismissing the complaint because it was not timely filed.<sup>1/</sup> We agree.

### **BACKGROUND<sup>2/</sup>**

Linda Roberts was employed by Respondent Battelle Memorial Institute and made verbal and written complaints of an unspecified nature to Battelle management and its ethics committee between 1990 and her discharge in 1994. *See* Complainant's Justification of Timeliness (Comp.

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<sup>1/</sup> The ERA provides that "[a]ny employee who believes that he has been discharged or otherwise discriminated against by any person in violation of [the employee protection provision of the statute] may, within 180 days after such violation occurs, file . . . a complaint with the Secretary of Labor . . . alleging such discharge or discrimination." 42 U.S.C. § 5851(b)(1).

<sup>2/</sup> Since there was no hearing in this case, we do not make findings of fact. Like the ALJ, we will rely upon the facts alleged by Roberts in various submissions to the ALJ and to this Board.

Justification), dated Oct. 16, 1996, at ¶1. She filed sex discrimination and equal pay charges against Respondents with the Ohio Civil Rights Commission (OCRC) and the Equal Employment Opportunity Commission (EEOC) in March 1994 (March charges). Roberts filed additional charges with the OCRC and EEOC on June 6 and 23, 1994. Neither the March nor the June 23 charges mention health or safety complaints as issues raised by Roberts. Of these charges, Roberts alleges that only the June 6 charge constitutes an ERA whistleblower complaint. See Comp. Justification at ¶3. The closest the June 6 charge comes to stating a claim under the ERA's employee protection provision is where Roberts alleges that she was retaliated against due to the filing of her March charges because she was "forced to report directly to a Sub-Contractor rather than Respondent, and this has created a hostile and unsafe environment."

Battelle suspended Roberts without pay from June 21 through June 23, 1994 and discharged her on July 18, 1994. On August 2, 1994, Roberts made a telephone complaint of an unspecified nature to the Department of Energy concerning Respondents. Comp. Justification ¶5. The Energy Department allegedly advised Roberts to use internal methods of appeal. *Id.*

On January 12, 1995, Roberts submitted to the United States Department of Labor a complaint under the provisions of Executive Order 11246, 3 C.F.R. 339 (1964-65), *reprinted as amended* in 42 U.S.C. § 2000e note (1988),<sup>3/</sup> which bars Federal contractors from employment discrimination on the basis of race, color, religion, sex, and national origin. The Director of Regional Operations for the Office of Federal Contract Compliance Programs of the Department of Labor responded that, under a Memorandum of Understanding, Roberts' complaint under the Executive Order was forwarded to the EEOC for processing and handling. Mar. 18 Brief of Comp., Ex. 1.

Roberts next mailed a letter-complaint on January 27, 1995 to the United States Department of Energy.<sup>4/</sup> The Department of Energy promptly forwarded a copy of the complaint to the Department of Labor. More than a year later, the Energy Department notified Roberts that it lacked jurisdiction over the January 27 complaint and suggested that she file with the Nuclear Regulatory Commission and the Department of Labor.

The Wage and Hour Division of the Department of Labor considered the January 27 complaint and denied it because it was filed more than 180 days after the date of the alleged discrimination. Roberts sought a hearing before an ALJ, who ordered her to show cause why the complaint was timely. After reviewing the record, the ALJ recommended denying the complaint as untimely.

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<sup>3/</sup> The January 12, 1995 letter was not sent to Respondents and is not in the record.

<sup>4/</sup> Although the ALJ sometimes referred to the letter as "received by the Department of Energy" on January 27, 1995, R. D. and O. at 4, he also states that "Complainant filed a complaint with the U.S. Department of Energy by letter dated January 27, 1995." R. D. and O. at 2. Roberts indicates that she mailed the letter on that date. Comp. Justification ¶7.

## DISCUSSION

The ERA prohibits an employer from discriminating against, or discharging, any employee because the employee:

- (A) notified his employer of an alleged violation of [the ERA] or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*);
- (B) refused to engage in any practice made unlawful by this Act of the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
- (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954;
- (D) commenced, caused to be commenced, or is about to commence . . . a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
- (E) testified or is about to testify in any such proceeding or;
- (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954.

42 U.S.C. § 5851(a)(1).

An employee's internal complaints to managers concerning nuclear safety or health are protected under the ERA. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). Although Roberts made numerous unspecified complaints to Battelle's managers and ethics committee from 1990 through her discharge, she has not stated that those complaints concerned nuclear health or safety, and therefore we cannot determine if they were protected under the ERA. In any event, the ALJ found that Roberts' June 6, 1994 charge filed with OCRC and EEOC raised a nuclear health or safety concern and therefore was a protected activity under the ERA. R. D. and O. at 3-4.<sup>5/</sup> We concur.

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<sup>5/</sup> The ALJ assumed, for the purpose of rendering a summary decision, that the safety issue Roberts raised was within the purview of the ERA, and we agree with that assumption. See Battelle's August 12, 1994 submission to OCRC, Attachment A at p. 9 ("In general, the purpose of the [Battelle  
(continued...)

Two adverse actions occurred after Roberts filed the June 6 charge: suspension without pay on June 21-23, 1994 and discharge on July 18, 1994. Under the ERA, Roberts had, at most, 180 days following her discharge to file a complaint.

Although Roberts does not clearly assert that her August 1994 telephone complaint to the Department of Energy should be considered a timely ERA complaint, we will consider the issue. To be valid, an ERA complaint must be in writing. 29 C.F.R. § 24.3(c) (1994). *See also, Mitchell v. EG&G (Idaho)*, Case No. 87-ERA-22, Sec. Fin. Dec. and Ord., July 22, 1993, slip op. at 11-18. In the absence of any written notation of the telephone conversation, we find that it could not constitute a valid ERA complaint.

Roberts argues that she filed a timely written complaint with the Department of Labor on January 12, 1995, which is within the 180 day limitation period following her discharge. She has not provided a copy of that complaint to Respondents, the ALJ, or this Board. The January 12 complaint was brought under the Executive Order that prohibits discrimination only on the basis of race, color, religion, sex, and national origin. *See* Mar. 18, 1997 Brief of Comp., Ex. 1. The fact that the complaint was forwarded to the EEOC for processing also suggests that it was filed pursuant to the Executive Order. Although it is possible that the complaint included statements that would constitute a cognizable claim under the ERA, since a copy of the complaint has not been produced for review, there is no basis from which the Board can conclude that it did. Therefore, we find that the January 12, 1995 letter did not constitute an ERA complaint.<sup>5/</sup>

We turn now to the timeliness of the January 27, 1995 letter Roberts sent to the Department of Energy. We note that we are not penalizing Roberts for filing this complaint, which apparently alleged discrimination for raising health and safety issues, with the wrong Government agency. Rather, we treat the complaint as if it were filed properly with the Department of Labor on the date it was sent. *See School District of Allentown*, 657 F.2d at 20.

However, the Board agrees with the ALJ's analysis of the timeliness of the January 27 letter, and concludes that it was not timely filed. January 27, 1995 was more than 180 days after

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<sup>5/</sup>(...continued)

division for which Roberts worked] is to clean and restore Battelle facilities which contain residual fixed radioactive contamination as a result of Battelle research for the U.S. Government.”).

<sup>6/</sup> A valid basis for equitable tolling of the limitation period may exist where the complainant “has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.” *School District of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981), quoting *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978).

Roberts' discharge. The ALJ properly determined that in this case, there is no basis for the equitable tolling of the limitation period. Consequently we adopt the ALJ's decision, which is attached. The complaint is **DISMISSED** as untimely filed.

**SO ORDERED.**

**DAVID A. O'BRIEN**  
Chair

**KARL J. SANDSTROM**  
Member

**JOYCE D. MILLER**  
Alternate Member